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Supreme Court of the United States

OCTOBER TERM, 1956

No. 247

THE BRITISH TRANSPORT COMMISSION, PETITIONER,

v.

UNITED STATES OF AMERICA, as Owner of the U.S.N.S. Haiti Victory, et al., RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR PETITIONER

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BRIEF FOR PETITIONER

OPINIONS BELOW

The District Court's memorandum opinion and order holding that petitioner could not be impleaded by other claimants under Admiralty Rule 56 (R. 58-59) is not reported. The same court's memorandum opinion exonerating the United States, as owner of the HAITI VICTORY, from liability adopted by the court as its findings of fact and conclusions of law (R. 64-71) is reported at 131 F. Supp. 712. The opinion of the United States

Court of Appeals for the Fourth Circuit (R. 77-88) is reported at 230 F. 2d 139.

JURISDICTION

The action is one in admiralty, originated by petition of the United States, as owner of the U.S.N.S. HAITI VICTORY, seeking exoneration from or limitation of liability arising out of a collision in 1953 in the North Sea between the HAITI VICTORY and the S.S. DUKE OF YORK, owned and operated by petitioner.

The decree of the United States Court of Appeals for the Fourth Circuit was entered on February 13, 1956 (R. 88-89). On April 10, 1956, the time for filing a petition for writ of certiorari was extended to and including July 12, 1956 by an order signed by the Chief Justice. The petition for a writ of certiorari was filed on July 11, 1956, and, limited to the question set forth below, was granted on October 8, 1956. The jurisdiction of this Court rests upon 28 U.S.C. § 1254 (1).

QUESTION PRESENTED

The United States, as owner of a vessel which rammed the British Transport Commission vessel DUKE OF YORK in the North Sea, brought limitation of liability proceedings in the District Court. In accordance with Admiralty Rule 51, all persons having claims against the United States arising out of the collision were admonished to file them in this proceeding. Accordingly, the British Transport Commission, whose vessel was badly damaged by the HAITI VICTORY, filed its claim. The question presented is whether other claimants in the proceeding may implead the Commission, under the alleged authority of Admiralty Rule 56, to respond to them in damages for losses suffered by them in the collision.

STATUTES AND RULES INVOLVED

Sections 183(a) and 185 of Title 46, United States Code, and Admiralty Rules 51, 53 and 56 are set out in the Appendix, *infra*, pp. 44-50.

STATEMENT

On May 6, 1953, in the North Sea, the Naval Transport HAITI VICTORY, owned by the United States, rammed the overnight channel ferry DUKE OF YORK, owned by the Transport Commission. The bow of the HAITI VICTORY knifed so deeply into the port side of the DUKE OF YORK just forward of her bridge that the entire bow of that vessel broke away and sank. Several passengers on the DUKE OF YORK were killed, others were injured, and a large number lost their baggage. The HAITI suffered only minor damage to her bow.

The United States as owner of the HAITI VICTORY filed a petition in the United States District Court for the Eastern District of Virginia under the Federal Limitation of Liability Statute (Rev. Stat. §§ 4283-86, 46 U.S.C. §§ 183-186) and Admiralty Rule 51, seeking exoneration from or limitation of liability for all losses and damages resulting from the collision. Petitioner filed in this proceeding a claim of $1,500,000 for the losses and damages sustained by its vessel, the DUKE OF YORK. A number of death, personal injury, and damage claimants also filed claims in varying amounts.

Some of these claimants then filed petitions in this case to implead petitioner, under the alleged authority of General Admiralty Rule 56. The District Court denied these impleading petitions, holding that other claimants could not implead petitioner for the reason that a limitation proceeding does not provide a forum for the adjudication of liability of claimants to each

other (R. 58-59). Then, after a trial, the District Court held that the DUKE OF YORK was solely to blame for the collision, and a final decree exonerating the HAITI VICTORY was filed in accordance with this opinion (R. 73-74).

On appeals by all parties, the United States Court of Appeals for the Fourth Circuit affirmed the decision of the District Court exonerating the HAITI VICTORY and holding the DUKE OF YORK solely responsible for the collision. But it reversed the District Court's order denying the right of other claimants to implead petitioner under Admiralty Rule 56. While noting that the issue appeared "to be a question of first impression," the Court of Appeals held, largely in reliance upon analogies drawn from receivership proceedings, that impleader of petitioner was proper under the Admiralty Rules. It accordingly remanded the cause to the District Court for further proceedings (R. 88-89).

The United States did not join with other claimants in attempting to implead petitioner in the District Court, although it filed a "cross assignment of error" on the appeal to the court below, stating that "the District Court erred in denying to claimants and to petitioner the right to cross-claim and implead the owners of the S.S. DUKE OF YORK". On remand to the District Court, following the decision of the Court of Appeals, the United States filed a so-called "cross libel" against petitioner, attempting to obtain service on petitioner by serving its proctors in this proceeding. Petitioner has moved to quash service of this cross libel and has also filed exceptions to it. Thus no claim or right of the United States has been passed upon by the courts below, and no such claim or right is now before this Court. The question which *is* before this Court is the right of Arthur Goodman and other co-claimants

with the Transport Commission in the HAITI VICTORY's limitation proceedings to implead the Transport Commission under Admiralty Rule 56.

SUMMARY OF ARGUMENT

I

Impleader under Admiralty Rule 56 is here sought as a means by which Transport Commission, a claimant in a limitation of liability proceeding not otherwise subject to the jurisdiction of the court, can be held to answer claims against it by co-claimants in that proceeding. The history, purpose and wording of Rule 56 combine to show that it is not, and was not intended to be, a means of fusing into the special and limited procedure by which the limitation of the liability of a shipowner is established and claims against him marshalled, determined and satisfied, a wholly separate proceeding involving controversies between co-claimants.

The principles of limitation of liability were established by statute in 1851, and appropriate procedures were specified by the court in the Admiralty Rules. See *Providence & N. Y. S. S. Co.* v. *Hill Mfg. Co.*, 109 U.S. 578-590. Rule 56 is later in origin and rooted in different considerations. As first adopted in 1883 (as Rule 59) it made generally applicable the rule of *The Hudson*, 15 Fed 162 (S.D. N.Y. 1883), permitting the joinder by one vessel which is libeled in a collision case of another vessel alleged to be also at fault in a collision case. Later decisions in other types of libel proceedings permitted the respondent, if the action were *in personam*, or the claimant of the vessel proceeded against if the action were *in rem*, to bring in third parties upon allegation of fault or negligence. This practice was in turn embodied in the revision of the Admiralty Rules

in 1920, when Rule 59, as revised, became the present Rule 56.

Moreover, Rule 56, written to be applicable to libel actions, is wholly inapplicable to an attempt to adjudicate a claim of one co-claimant against another in a limitation proceeding. For example, the time limitations in the rule refer to "the libel", and the impleaded party is required to answer "the libel". The "claimant" referred to in Rule 56 does not refer to a claimant in a limitation of liability proceeding. Under Rule 59 it is clear that the "claimant" or "respondent" who was entitled to file a petition to bring in a third party was one who was in the posture of a defendant—the "claimant of the vessel proceeded against", if the proceeding was *in rem*, or the respondent, if the action was *in personam*. When Rule 59 was revised in 1920 and became Rule 56, the word "claimant" retained the same meaning—the claimant *of* the vessel. It does not refer to one who claims *against* the vessel, and who is in the posture of a plaintiff.

II

There is no substance to the asserted considerations of convenience and judicial policy upon which the court below relied. The claimants who seek to implead Transport Commission have not been denied something which they had been led to expect they would have; they were plainly told that the proceeding involved only the presentation of claims against the HAITI VICTORY and the contesting of the petition of the United States for exoneration from or limitation of liability for those claims. Nor is there substance to the suggestion that requiring suit against Transport Commission in England would cause expense and delay. For English and continental claimants, who are in the great majority, the expense of proceeding in England should indeed be less, and for the American claimants the added expense is balanced

by the added expense to Transport Commission of proceeding in the United States. No more time need elapse before the evidence is produced in England than in America. Moreover, although the issue of fault has now been settled, there is grave doubt that money judgments by co-claimants against the Transport Commission on individual damage claims would be deemed *res judicata* in England when sought to be enforced there.

Nor is there substance in the asserted analogy to *Alexander* v. *Hillman*, 296 U.S. 222. The filing of a claim in a receivership is taken as submission to the jurisdiction of the court for full adjudication of all claims between the estate and the claimant because distribution cannot be made until there has been a determination of the receivership estate, including amounts which may be due from claimants. That policy has no application to controversies among claimants in a limitation of liability proceeding; no matter how they may be decided, the limitation fund is not affected. For the same reason, a bankruptcy court cannot adjudicate controversies among creditors even when they grow out of transactions involved in the bankruptcy proceedings. *Fulton National Bank* v. *Hozier*, 267 U.S. 276; In re *Chakos*, 24 F. 2d 482 (7th Cir. 1928).

III

The authorities are uniformly contrary to the decision below. Benedict on Admiralty, the leading text, states flatly that impleader under Rule 56 is "not permitted in a limitation proceeding." Vol. 2, Sec. 349, 1955 Supp. p. 31. The Court of Appeals for the Fifth Circuit has so held in a case closely analogous to the present one. *Department of Highways* v. *Jahncke Service*, 174 F. 2d 894 (1949). Several decisions have reached the same result in cases where a limitation petitioner, rather than a co-claimant in a limitation proceeding,

has sought to invoke Rule 56 (*New Jersey Barging Corp.* v. *T.A.D. Jones & Co.*, 135 F. Supp. 97 (S.D.N.Y. 1955); *Petition of Texas Co*, 81 F. Supp. 758 (S.D. N.Y. 1948); *Poling Bros. No. 5 — Tom Wogan*, 1937 A.M.C. 1513 (E.D.N.Y.); *cf. The Steel Inventor*, 1925 A.M.C. 226 (E.D.N.Y.)) although a recent decision, relying in part on the opinion of the court below in the present case, reached a contrary conclusion in that situation. *Moore-McCormack Lines, Inc.* v. *McMahon*, 235 F. 2d 142 (2d Cir. 1956).

There are, moreover, substantial dangers involved in permitting, in limitation of liability proceedings, the impleader of claimants not otherwise within the jurisdiction of the limitation court. Limitation proceedings can accomplish their purpose of marshalling claims and discharging American shipowners of liability only if foreign claimants, who cannot be ordered to appear by monition, are willing nonetheless to do so. At the present time, as the instant case shows, they do appear and file claims. However, if the filing of a claim by a foreign claimant subjects him to suit by other claimants under a law foreign to him, he may ignore the limitation proceeding and bring an independent suit in his own country. Were many foreign claimants to elect that course, the effectiveness of limitation of liability procedures would be substantially destroyed. It is significant, in this connection, that in none of the numerous foreign countries which permit limitation of liability is a claimant exposed to the risk which the decision below imposes upon claimants in limitation of liability proceedings in the United States.

ARGUMENT

The issue presented here for review is whether Admiralty Rule 56, by its terms and in the light of history

and authority, either describes a limitation of liability proceeding as among those to which the rule is applicable, or describes those who here seek to invoke the rule as among those entitled to do so. Is a limitation of liability proceeding a "suit, whether *in rem* or *in personam*" into which a new party in the posture of a defendant may be introduced? Are the respondents who sought to implead Transport Commission in the position required by Rule 56 of those who may invoke it; that is, in the position of defending against asserted liability? The answer to both questions is, no. Neither the specific language used, nor the antecedents of the rules, nor considerations of equity or policy, require or permit Transport Commission under these circumstances, in an alien jurisdiction and under alien law not of its choosing, to be subjected to liability. Nor does the rule permit or require foreign claimants to come to this jurisdiction to litigate with Transport Commission.

I

History and analysis demonstrate that the impleader of Transport Commission was erroneous

A brief reference to the history and purpose, not only of Rule 56, but of Rules 51-54, which regulate limitation proceedings, is helpful. In our admiralty courts limitation of liability is over thirty years older than the third party practice which is the subject of Rule 56. The occasion for and the purpose of the latter rule had and has nothing to do with the principles of limitation.

In this country, and in others where the right is granted, limitation is a legislative graft upon the principles of admiralty. As the size of ships grew with the passing of the days of sail, liabilities which might be incurred by a shipowner in a major disaster could be so

great as to discourage venturing on the sea. Maritime nations acted to permit limitation of liability, in general by separating the owner's *fortune de mer* (his interest in the ship) and his *fortune de terre* (his general estate). See Marsden, *Collision at Sea* (10th ed.), pp. 175-178. The United States did likewise.[1]

The legislation in this country (the Act of March 3, 1851, c. 43, 9 Stat. 635, as amended, Rev. Stat. §§ 4283-86, 46 U.S.C. §§ 183-186) was, in its sponsorship, both eminent and, to use a word unknown at the time, bipartisan. The bill in the Senate (S. 251, 31st Cong., 2d Sess.) was introduced by Hannibal Hamlin of Maine. The Senator asking for the yeas and nays was Jefferson Davis of Mississippi (Congressional Globe, Dec. 2, 1850-March 3, 1851, p. 738). The law permitted a shipowner to limit his liability for, among other things, loss, damage, or injury from collision, occurring "without the privity or knowledge of such owner", to "the value of the interest of such owner in such vessel and her freight then pending". This Court has declared that the purpose of the statute was "to encourage investments in shipbuilding and to afford an opportunity for the determination of claims against the vessel and its owner." *Just* v. *Chambers*, 312 U.S. 383, 385.

The form of proceeding by which limitation of liability might be secured was not prescribed by the statute, other than that it should be "appropriate" (Rev. Stat. § 4284, 46 U.S.C. § 184). "We have said," wrote Mr. Justice Bradley, this Court's great authority on

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[1] For a more detailed history of limitation of liability laws in this country and abroad, see *Norwich Co.* v. *Wright*, 13 Wall. 104, 116-122; *Providence & N.Y. S.S. Co.* v. *Hill Mfg. Co.*, 109 U.S. 578, 587-590; *The Main* v. *Williams*, 152 U.S. 122, 126-128.

limitation of liability, in *Providence & N. Y. S. S. Co.* v. *Hill Mfg. Co.*, 109 U.S. 578, 590, "that, by the provisions of the act, the scheme was sketched in outline. A reference to its provisions shows that it was only in outline; and that the regulation of details as to the form and modes of proceeding was left to be prescribed by judicial authority. The law was evidently drawn in view of similar laws adopted and in operation in England and in some of the States. It laid down a few general principles and propositions, and left it to the courts to enforce them and carry them into practical effect.

"Although the act was passed in 1851, it stood on the statute book for twenty years before a careful scrutiny of its provisions was demanded of this court. In the case of *The Norwich Transportation Company* v. *Wright*, decided in December term, 1871, and reported in 13 Wallace, 104, we were called upon to interpret the act, and to adopt some general rules for the better carrying of it into effect. On that occasion, a history of similar acts, both in England and this country, an examination of the general maritime law on the same subject, and the circumstances under which the act of 1851 was passed, were reviewed, and the general effect and construction of the act were examined and discussed. The consideration given to the whole subject in the opinion delivered in that case, and in subsequent opinions of this court when the matter has been brought up for examination, notably in the cases of *The Benefactor*, 103 U.S. 239, and *The North Star*, 106 U.S. 17, supersedes the necessity of any minute examination of the law at this time. We will make one extract from the opinion in the case first referred to. It is there said:

" 'The proper course of proceeding * * * For aiding parties in this behalf, and facilitating pro-

ceedings in the district courts, we have prepared some rules which will be announced at an early day.'

"These rules were announced at a subsequent day of the same term, and will be found at the commencement of 13 Wallace, pages xii. xiii."

The benefit of the limitation of liability provided by the Statute of 1851 may be claimed by way of defense,[2] or by initiation of the proceeding established by the rules of 1872, as amended. Proceeding under the rules the shipowner files his petition in the appropriate district court and either surrenders the vessel or posts a bond for the value after the accident of his interest in the vessel and her freight. The court then issues its "monition against all persons asserting claims in respect to which the petition seeks limitation", which is published in such newspapers as the court may direct. Here it was published in, among others, London newspapers. (R. 29). The monition directs all persons having claims that they "must file them under oath, . . . with the clerk of this Court" before a date certain "or be defaulted. Personal attendance is not required." And the court "shall also, on the application of the petitioner, make an order to restrain the further prosecution of all and any suit or suits against the petitioner and/or said vessel in respect to any claim or claims subject to limitation in the proceeding." (Rule 51, *infra*, p. 47).

In the subsequent proceedings determinations are made as to whether liability exists, whether it may be limited and what amount, if any, should be awarded

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[2] *The "Benefactor"*, 103 U.S. 239; *Providence & N.Y. S.S. Co. v. Hill Mfg Co.*, 109 U.S. 578, 594.

to those filing claims. If liability is found, the *res* in the custody of the court, if there be any (the vessel or its value as appraised after the accident, and the pending freight for the voyage), is then distributed pro rata to all established claims according to their priorities, innocent parties taking precedence and death and personal injury claimants having the benefit of Rev. Stat. § 4283(b), as amended, 49 Stat. 1479-80, 46 U.S.C. § 183(b).[3]

Plainly, a proceeding in the admiralty to limit liability has been aptly described by an eminent authority as a "special proceeding, *sui generis*." *Benedict on Admiralty* (6th ed. 1940) §479, *et. seq.* In order to bring all the claims into concourse and settle the shipowner's liability as expeditiously as possible, he is given the choice of forum and those who have suffered loss and injury are "brought in against their will and prevented from establishing their claims in other courts", *Hartford Accident & Indemnity Co.* v. *Southern Pacific Co.*, 273 U.S. 207, 217—that is, prevented, so far as the United States has power to prevent them. In this unique proceeding the moving party, the shipowner, has two attributes of a plaintiff. He takes the initiative in instituting the proceedings, and he chooses the forum. But his chief attributes are those of a defendant, in that he seeks exoneration from fault or, in any event, to minimize the claims against him. On the other hand, those brought in against their will to prove their loss and damage have only the attributes of plaintiffs, albeit involuntary ones.

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[3] Should limitation be denied, the court may add to the fund in its custody by an *in personam* judgment against the owner to satisfy the full allowed value of the claims. *Hartford Accident & Indemnity Co.* v. *Southern Pacific Co.*, 273 U.S. 207.

During the century and more that this limitation of liability procedure has existed, it has been judicially administered so as to marshal, determine, and dispose finally of all claims *against the shipowner-petitioner*. In furtherance of *that* purpose, (the purpose, as Mr. Justice Bradley puts it, "of giving to shipowners the full benefit of the immunities intended to be secured by it," *Providence & N.Y.S.S. Co.* v. *Hill Mfg. Co., supra*, 109 U.S. at p. 589) the Court has given the Act a broad and equitable construction. *Norwich Co.* v. *Wright*, 13 Wall. 104, 121-22; *Providence & N.Y.S.S. Co.* v. *Hill Mfg. Co., supra; Butler* v. *Boston and Savannah S.S. Co.*, 130 U.S. 527, 549-50; *Just* v. *Chambers*, 312 U.S. 383, 385; *Coryell* v. *Phipps*, 317 U.S. 406, 411. What respondents have sought here is quite different. The court below, by fusing with this proceeding, so special in nature, the totally inapplicable third party procedure provided by Rule 56 for wholly different reasons, drastically changes the proceeding from one to limit liability of a shipowner-petitioner to one where claims against other claimants may also be adjudicated.

Rule 56, as suggested, is later in origin and rooted in different considerations. In the October term of 1876 this Court decided *The "Atlas"*, 93 U.S. 302. It held, contrary to what, based upon British precedent (*The "Milan"* Lush. Adm. 388, 401), was said to have been the rule in the admiralty, that a libelant might recover his damages in full from one of two parties at fault, leaving the party sued to pursue contribution from the other wrongdoer. As a result of this decision, Judge Addison Brown, a distinguished admiralty judge, held in *The Hudson*, 15 Fed. 162 (S.D.N.Y. 1883), that where a libelant had proceeded against (libeled) one of two tugs at fault in a collision, the claimant (*i.e.*, the owner of the libeled tug) might, upon petition and

proper service, have the other tug "brought in as a party to the action [libel] in order that the damages might be apportioned between the two tugs, as would have been done had the [other tug] been joined as a party and adjudicated in fault." *The Hudson* was decided February 7, 1883. Rule 56 (then Rule 59) was promulgated, institutionalizing the decision, on March 26, 1883, 112 U.S. 743. For a discussion by this Court of the nexus between decision and rule see In re *New York and Porto Rico S. S. Co.*, 155 U.S. 523, 527; see also *Benedict on Admiralty* (3d ed. 1898) § 482b, pp. 271-72.

Rule 59 (now Rule 56) as adopted in 1883 read as follows:

> "In a suit for damage by collision, if the claimant of any vessel proceeded against, or any respondent proceeded against *in personam*, shall, by petition, on oath, presented before or at the time of answering the libel, or within such further time as the court may allow, and containing suitable allegations showing fault or negligence in any other vessel contributing to the same collision, and the particulars thereof, and that such other vessel or any other party ought to be proceeded against in the same suit for such damage, pray that process be issued against such vessel or party to that end, such process may be issued . . ."[4]

The Hudson was a collision case, and the resulting Rule 59 of 1883 was a collision case rule. Shortly thereafter, however, Judge Brown permitted the bringing in

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[4] 112 U.S. 743. The remainder of Rule 59 in its original form is substantially similar to the last two sentences of present Rule 56. See P. 50, *infra*.

of a third party by the claimant of the libeled ship in a cargo damage case. "The case of *The Hudson, supra,*" he said, "and the fifty-ninth rule in admiralty, though not literally applicable, furnish also an analogy for this order." *The Alert*, 40 Fed. 836, 839 (S.D.N.Y. 1889). This Court referred to *The Alert* with approval in *The Barnstable*, 181 U.S. 464, 467, and since then the respondent in an action *in personam*, or claimant of the vessel proceeded against in an action *in rem* (as the case may be) have brought in third parties in libel proceedings to enforce a lien for supplies, a lien for towing services, for salvage, or for stolen, misdelivered, or damaged cargo. 2 *Benedict on Admiralty* (6th ed. 1940) § 349, n. 24. This practice was in turn institutionalized in the revision of the General Admiralty Rules in 1920 in which Rule 59, as revised, became Rule 56. 254 U.S., app. p. 29.

It will be noted that in the original Rule 59 the "claimant" or "respondent" who was entitled to file a petition to bring in a third party was "the claimant of any vessel proceeded against" (where the libel was *in rem*), or "any respondent proceeded against *in personam.*" The "claimant" was not a person presenting a claim—one in the posture of libelant or plaintiff—but the claimant of the ship libeled—one in the posture of a defendant. When the rule was made applicable to other than collision cases, the word "claimant", as the context shows, retained that same meaning. The new language—that "in any suit, whether *in rem* or *in personam*, the claimant or respondent (as the case may be) shall be entitled to bring in any other vessel or person"—shows that "claimant" still referred to the claimant of a vessel in an *in rem* action. It does not refer to a "claimant" in a limitation proceeding, who is a claimant *against* a vessel—a plaintiff—rather than a "claimant of any vessel proceeded against"—a defendant.

The extension of the third party practice to libel actions other than those arising out of collision did not, in other words, change the basic fact that the procedure was available only to a party in the posture of a defendant —*i.e.*, a respondent or a claimant of a vessel proceeded against. A libelant, to be sure, has always been able to bring in other parties by amending his libel and serving them. He cannot, however, do so by petition under Rule 56. *The Johan Poulsen*, 1925 A.M.C. 178 (D. Ore. 1924).

The illumination of history and analysis begins to make clearer the considerations involved here. The statute of 1851 laid down a rule of substantive law—that the liability of a shipowner whose vessel collides with another "without the privity or knowledge of such owner" "shall in no case exceed the amount or value of the interest of such owner * * *, in such ship or vessel, and her freight then pending." The statute is imperative. No greater liability may, under the law, be enforced whatever the procedure. "It would," said Mr. Justice Bradley, "be a questionable exercise by this court, of its power to regulate the proceedings, if, by such regulation, it should prevent a party from having the benefit of the law unless he took initiatory steps for that purpose before it appeared that he was liable at all. Such was not the intention of the rules adopted in 1872. Admiralty Rules, 54-57." *The "Benefactor"*, 103 U.S. 239, 244.

The purpose of the rules was to regulate the "initiatory steps," provided by § 185, Title 46 U.S.C., which at his option the owner might take in order to bring the claims against him into concourse and have a determination of where he stood. If Transport Commission and other claimants had chosen to bring libel proceedings against HAITI VICTORY and the United

States, there is no question that liability would have been determined by § 183(a). *The "Benefactor", supra.* It would have been true, also, that the libelant, having chosen the forum and availed of its process to hale the vessel and its owner before it, must respond to any counterclaim growing out of the collision which the owner may assert by cross libel. Indeed Admiralty Rule 50 requires that "the respondent in the cross-libel shall give security in the usual amount and form to respond in damages to the claims set forth in said cross-libel, unless the court for cause shown, shall otherwise direct; and all proceedings on the original libel shall be stayed until such security be given unless the court otherwise directs." Similarly a third person intervening in the proceedings for his own interest "shall be required . . . to give a stipulation with sufficient sureties . . ..to pay all such costs and expenses and damages as shall be awarded against him by the court on the final decree. . . ." Admiralty Rule 34.

But the statutory proceeding established by § 185 is very different from a libel. Ina forum of his choosing

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If his ship has neither been libeled nor is present in any district, and he himself has not been sued on account of any claim in respect to which he seeks to limit his liability, the vessel owner is permitted by Admiralty Rule 54 to file his limitation petition in *any* district court. Hence as a practical matter, the owner can, by prompt filing of the petition and removal of his ship, if it is in United States waters, choose his own forum. No other litigant in either admiralty, or in legal proceedings generally, has such freedom. Plaintiffs in admiralty proceedings other than those for limitation are restricted, like other plaintiffs, to forums where they can either attach the property of the owner or gain personal jurisdiction over him by reason of his residence or service of process upon him. A bankrupt or his creditors cannot freely choose a forum since only a court located in the district where the debtor has his place of business,

"the vessel owner, within six months after a claimant shall have given to or filed with such owner written notice of claim, may petition a district court of the United States of competent jurisdiction for limitation of liability" and shall surrender the ship or its value. "Upon compliance with the requirements of this section all claims and proceedings against the owner with respect to the matter in question shall cease." And wholly unlike the requirement of Rule 34 that interveners shall give security for possible damages decreed against them, Rule 51 requires no bond or security of any sort from persons claiming—not even attendance—and provides for no counterclaims against them.[6] The sole purpose of the proceeding and the sole

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residence, domicile, or property has the power to adjudge him bankrupt. 11 U.S.C. § 11. Even statutes which liberalize the traditional limits of process and venue do not by any means afford freedom of forum selection. The Federal Interpleader Act, for example, permits extraterritorial service of process, 28 U.S.C. § 2361, but venue, although not so restricted as under the general venue statute (28 U.S.C. § 1391), is still limited to a district where one or more claimants reside, 28 U.S.C. § 1397. See also Securities Act, 15 U.S.C. § 77v; Securities Exchange Act, 15 U.S.C. § 79y; Investment Company Act, 15 U.S.C. § 80a-43; Sherman Act, 15 U.S.C. § 5. The vessel owner in limitation proceedings can, on the other hand, pick a forum where potential claimants do not reside, or do business, or possess property, or are present either personally or through agents.

[6] The narrow nature and scope of the limitation of liability proceeding may also be seen from the established practice under local admiralty rules. Thus, although Section 5(b) of the 1939 Admiralty Rules for the Eastern District of Virginia, in effect when the instant claims were filed, provided that "no process *in rem* nor process of arrest or attachment shall issue, nor shall any appearance or answer be received . . . unless a stipulation in the penalty of $250 shall be first entered into by the party, and at least one surety, resident in the district, conditioned that the principal shall pay all

power of the court provided by the statute is to determine the disposition of the *res* in its possession. Neither the statute nor the Admiralty Rules contemplate nor provide for an enlargement of the proceeding to hear and determine claims asserted against the claimants, either by one or more of them or by the shipowner-initiator of the action. Indeed the issues to be considered are specified with particularity in the rules. Rule 52 establishes procedures for proving, determining, and satisfying the claims made against the fund. Rule 53 provides for the right of the owner to contest liability and of the claimants to contest exoneration from or limitation of liability. Thus are established the scope and the boundaries of this "special proceeding, *sui generis.*"

History and analysis lead us also to two conclusions respecting the procedures established by these rules. First, limitation of liability procedure is designed and constructed for a strictly limited purpose, to determine liability and, in accord with that determination, to dispose of the *res*—either returning it to the owner or distributing it among the claimants. So one entering this proceeding as a claimant subjects himself to the jurisdiction of the court only for the purpose of, and to the extent necessary to, disposition of the issues contemplated and permitted by the statute and the rules.

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costs awarded against him," the instant claimants entered the proceeding without regard to these requirements.

Section 6(a) of the 1952 rules of the important admiralty district courts for the Southern and Eastern Districts of New York, which served as a model for Section 6(a) of the new rules for the Eastern District of Virginia, effective July 17, 1954, provides that "no libel, petition, appearance, claim or answer shall be filed . . . unless the party offering the same shall file a stipulation for costs" in the amounts of $100 for suits *in personam* and $250 for suits *in rem*. Under settled practice, this section is likewise deemed inapplicable to claimants in a limitation of liability proceeding.

He does not subject himself, by responding to the monition to appear or be defaulted, to the determination of liability against himself. Therefore, mere service of writ upon his proctors, appearing for this limited purpose, does not subject him to the general jurisdiction of the court for the purpose of responding in damages. And it makes no difference whether the writ is thought of or called an original libel, a cross libel, or a petition to interplead. It is ineffective to give the court power to impose liability upon him. As the District Court said in this cause, "a limitation proceeding does not provide a forum for the adjudication of liability of co-claimants to each other." (R. 59)

Second, Rule 56 describes no process available to those who sought in this case to subject Transport Commission to liability. To begin with, the kind of admiralty suit in which new defendants may be impleaded is very specifically described in the rule. It is applicable to *libel* proceedings, whether *in rem* or *in personam*—a category into which limitation proceedings do not fall: The language of the rule makes this clear. (1) As to the time when the rule may be invoked, it may be done "before or at the time of answering *the libel.*" (2) The rule provides that after service of the petition to implead on the third party, "such suit shall proceed as if such vessel or person had been *originally proceeded against.*" Now it is only in a libel —and certainly not in a limitation proceeding—that a ship or its owner, alleged to have been at fault is "*originally proceeded against.*" (3) The rule goes on to provide that, after service of the petition to implead, the "new party shall answer the libel." In short, the whole wording of Rule 56 is directed towards its availability in libel proceedings and its inapplicability to limitation proceedings.

Furthermore, as we have already pointed out above (pp. 16-17), the party to a libel proceeding who is entitled under Rule 56 to bring in a third party as defendant is only the defendant himself, in admiralty called the respondent or claimant of the vessel libeled. This may not be done by a libelant or intervener, or claimant for damages under any description, all of whom are, of course, in the position of plaintiffs, not defendants.

In short, Transport Commission, a foreign corporation resident in England, did not by responding to the monition to enter this special and limited proceeding to limit the liability of the United States, subject itself by mere service upon its proctors to claims for damages. Not only is this so, but Rule 56, the instrument by which the result is sought to be accomplished is not applicable to a limitation proceeding and not available to any party in the position of the claimants in this case.

II

The Asserted Considerations of Convenience and Judicial Policy Relied on by the Court Below Are Without Substance

The District Court in this cause expressed succinctly the principles applicable here:

> "To permit one claimant to prosecute another claimant in the limitation litigation would be unfair. The latter has intervened under compulsion, the court enjoining his resort to any other tribunal. Therefore, his responsibility should not be enlarged beyond that incident to his claim. Obedience to the injunction should not expose him to an attack to which, in regular course, he

would be subject only in the jurisdiction of his residence or other place of voluntary entrance. Department of Highway v. Jahncke Service (1949) 5 Cir. 174 F. 2d 894 sustains this position. Although the impleaded party was not already in the cause, the same principle there enforced governs here.

"Denial of the instant motion will be based upon the ground that a limitation proceeding does not provide a forum for the adjudication of liability of co-claimants to each other." (R. 59).

The Court of Appeals agreed that a "hardship might . . . be suffered by the Commission" through the adjudication of claims against it, but thought that there "would be an even greater hardship on the other claimants if they were left to enforce their rights by independent proceedings." (R. 85). Claimants from many parts of the world, it said, had filed their claims in the limitation proceeding instituted by the United States. The question of fault had been adjudicated and was *res adjudicata*. The court should, therefore, go on to settle claims against the Transport Commission, else the claimants would have to pursue their causes of action against the Commission in another forum. The proper equitable principles it found in receivership cases such as *Alexander* v. *Hillman*, 296 U.S. 222—where a creditor who has come into the proceeding to assert a claim against the estate must respond to one asserted by the estate. It concluded:

"Modern codes of procedure have reflected two facets: (1) all rights, if this can fairly be done, should be decided in a single legal proceeding; (2) parties who submit themselves to the juris-

diction of a court in a legal proceeding should be bound by that court's decision on all questions appropriate to and seasonably raised in that proceeding. Those ideas, we think, can reasonably be deduced from the spirit, if not the letter, of the 56th Admiralty Rule. Certainly that spirit finds support in the Federal Rules of Civil Procedure." (R. 87-88).

Since the Court of Appeals largely assumed its premises—for instance, that it would be a hardship for claimants in, say, England and on the continent to proceed against a British corporation at its place of business in England, and that the question of its liability is one "appropriate to" the limitation proceeding instituted by the United States, and that a limitation proceeding is analogous to a receivership proceeding—we had best examine these premises with some care.

We might start from the principle, seemingly not very controversial, that to deny claimants something to which they were not entitled, and to receive which no expectation had been raised, was not to expose them to a hardship. What was it to which they were entitled in the proceeding which the District Court admonished them to enter? The published notice required by Rule 51 is very specific indeed. It provided:

"Notice is given that United States of America has filed a petition pursuant to Title 46, U. S. Code, sections 183-189 and 789, claiming the right to exoneration from or limitation of liability for all claims arising on the voyage of the USNS HAITI VICTORY from New York City to Bremerhaven, Germany, terminating on May 8, 1953, at Bremerhaven. All persons having such claims must file them, under oath, as provided in United States

> Supreme Court Admiralty Rule 52, with the Clerk of this Court, at the United States Court House at Granby Street, Post Office Building, Norfolk, Virginia and serve on or mail to the petitioner's proctors * * * at * * * a copy on or before October 15, 1953, or be defaulted. Personal attendance is not required. Any claimant desiring to contest the claims of petitioner must file an answer to said petition, as required by Supreme Court Admiralty Rule 53, and serve on or mail to petitioner's proctors a copy." (R. 29-30).

Thus the claimants were plainly told that all that was involved in the proceeding was the presentation of claims against the HAITI VICTORY and the contesting of the claims of the United States to exoneration from or limitation of liability for these claims. How then can it be said that there would be "an even greater hardship on the other claimants if they were left to enforce their rights by independent proceedings"? Since when has it been a hardship to require plaintiffs to sue in the jurisdiction of the defendant's residence or where personal service may be had upon him?

Nor is there any greater substance in the concern expressed by the Court of Appeals that to require claimants to sue Transport Commission in England would cause them "great expense" and expose them to the risk that "perhaps much of the evidence necessary to support their claims would have been lost due to the lapse of time." Plainly, the expense to English and continental claimants of a proceeding in England is no greater, and probably a good deal less, than one in Norfolk, Virginia. As for the American claimants, the added expense of litigating in England is no greater than the added expense to Transport Commission of

litigating in America.[3] And as for the loss of evidence through lapse of time, it is difficult to understand what the court had in mind. No more time need elapse before the evidence is produced in England than in America, and, for the European claimants, convenience of producing it in England is infinitely greater.

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[3] This is one hardship, however, which might be imposed on Transport Commission by being required to respond to claims in the Norfolk proceeding which would be very serious indeed. Could Transport Commission claim limitation of liability in that proceeding? It is plain that more than six months have expired since Transport Commission was put on notice of claims against it. Hence a petition for limitation of liability under 46 U.S.C. 185 is barred by the terms of the 1926 amendment to the statute. But does the bar extend to interposing limitation of liability as a defense? In the Second Circuit the district courts have generally held the defense to be unavailable unless claimed within the six months. *Cantwell* v. *Meade*, 120 F. Supp. 406 (E.D. N.Y. 1954); *The Joseph O'Donnell*, 37 F. Supp. 120 (E.D. N.Y. 1940); *The Irving*, 33 F. Supp. 59 (S.D. N.Y. 1940). *Contra: Moran Towing & Transp. Co.* v. *United States*, 80 F. Supp. 623 (S.D. N.Y. 1948); *Cantey* v. *McLain Line, Inc.*, 40 F. Supp. 887 (S.D. N.Y. 1941). The Court of Appeals has noted the point but found it unnecessary to decide it. *United States Gypsum Co.* v. *Conners Marine Co.*, 119 F.2d 689 (1941). The Third Circuit has held that six months applies only to the procedure by petition and not to the assertion of limitation as a defense. *The Chickie*, 141 F.2d 80, 84 (3d Cir. 1944); *De Cruz* v. *Hiering*, 69 F. Supp. 397 (D. N.J. 1947). And similar decisions have been made in Massachusetts and Florida. *Carpenter* v. *Mary R. Mullins, Inc.*, 33 F. Supp. 10 (D. Mass. 1940); *Coryell* v. *Pilkington*, 39 F. Supp. 142 (S.D. Fla. 1941), *aff'd on other grounds sub nom. Coryell* v. *Phipps*, 128 F.2d 702 (5th Cir. 1942), 317 U.S. 406. The only district court opinion in the Fourth Circuit bearing on the point views the six-month bar as applicable to the assertion of limitation by way of defense. *The Bright*, 38 F. Supp. 574, 577 (D. Md. 1941), *aff'd on other grounds*, 124 F.2d 45. How would the Court of Appeals for the Fourth Circuit decide this question? And how would its decision—whichever way it went—affect Transport Commission's right to limit its liability under the provisions of English law?

As the Court itself points out, the question of fault has been decided, is *res adjudicata*, and need not—indeed, cannot—be litigated again in England between the parties to the present proceeding. See *The "Benefactor", supra; Algoma Central & Hudson Bay Ry. Co. v. Great Lakes Transportation Corp.*, 86 F. 2d 708 (2d Cir. 1936); *The Adah*, 258 Fed. 377 (2d Cir. 1919). The English law is the same where, as here, the parties submitted to the court the issue of fault, accepting the jurisdiction *for the purpose of deciding that question.*[5]

But it is far from clear that, should an American court undertake to determine, in this proceeding, the liability of Transport Commission and give judgment upon claims against it, those judgments would be received as conclusive and the issues they purported to settle would be regarded as *res adjudicata* when they were sought to be enforced in an English court. For at the time when Transport Commission filed its claim here, it certainly could not be said that American law put Transport Commission on notice that a consequence of filing that claim would be to subject the issue

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[5] *Guiard v. De Clermont & Donner*, [1914] 3 K.B. 145; *De Cosse Brissac v. Rathbone*, 6 H. & N. 301 (Ex. 1861); *see Emanuel v. Symon*, [1908] 1 K.B. 302, 309 (C.A.); *Schibsby v. Westenholz*, L.R. 6 Q.B. 155, 162 (1870); *Rousillon v. Rousillon*, 14 Ch. D. 351, 371 (1880); see Chesire, *Private International Law* 602-606 (4th ed. 1952).

The limitations of this doctrine, however, may be seen from *In re Dulles' Settlement (No. 2)*, [1951] Ch. 842. A ward of the court sought that his mother be given custody over him and that proper provision be made for his maintenance. Remaining beyond the territorial limits of the court, the father, by his counsel, contested the wife's claim for custody relying on a favorable French decree, but, as to the claim for maintenance, simply protested that the court had no jurisdiction over him. Carefully considering cases involving the enforcement of foreign judgments, the court held that contesting the issue of custody did not amount to a submission to jurisdiction on the maintenance claim.

of its own liability and claims against itself to the judgment of the same court. The Admiralty Rules of the Supreme Court of the United States would have seemed to provide the exact opposite, and such were the then decisions of American courts [9] and the pronouncement of its most distinguished writer on Admiralty law.[10]

Aside from the jurisdictional problems,[11] therefore, an English court regarding all the circumstances might well conclude that since Transport Commission was, in effect, lured into the predicament of facing numerous suits without the benefit of advantageous limitation rules and special defenses to which it is entitled under English law,[12] the judgment should not be enforced either on the ground that it stems from proceedings which "offend against English ideas of substantial justice" [13] or on the ground that "its recognition is contrary to public policy." [14]

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[9] *Department of Highways* v. *Jaüncke Service*, 174 F. 2d 891 (5th Cir., 1949); *New Jersey Barging Corp.* v. *T.A.D. Jones & Co.*, 135 F. Supp. 97 (S.D.N.Y. 1955); *Petition of Texas Co.*, 81 F. Supp. 758 (S.D.N.Y. 1948); *Poling Bros. No. 5—Tom Wogan*, 1937 A.M.C. 1513 (E.D.N.Y.)

[10] 2 *Benedict on Admiralty* (6th ed. 1940) § 349, 1955 Supp., p. 31.

[11] See note 8, *supra*

[12] Under English law the amount at which liability may be limited is far lower than in the United States, generally £15 per ton of tonnage. Merchant Shipping Act 1894 (57 & 58 Vict. c. 60) Sec. 503. Furthermore, the English rules of liability are substantially different from those applied in our courts. A carrier under English law may by appropriate contract and notice limit its liability for negligence, and periods of limitation for the assertion of damage or loss are different. See Collision Claims—Difference Between British and U.S. Law, Lloyds List and Shipping Gazette, July 14, 1953.

[13] *Salveson or von Lorang* v. *Administration of Austrian Property*, [1927] A.C. 641, 663; *Pemberton* v. *Hughes*, [1899] 1 Ch. 781, 790.

[14] In re *Maccartney*, [1921] 1 Ch. 522, 527

Finally, the Court of Appeals has been led astray by the belief that principles applied to counterclaims against claimants in equity receiverships furnish a guide here. The very case cited by the Court—*Alexander* v. *Hillman*, 296 U.S. 222—makes plain the reason, not present in the instant case, why the filing of a claim in a receivership is taken as submission to the jurisdiction of the court for full adjudication between the estate and the claimant. "Respondents' contention means," said this Court, "that, while invoking the court's jurisdiction to establish their right to participate in the distribution, they may deny its power to require them to account for what they misappropriated. In behalf of creditors and stockholders, the receivers reasonably may insist that, before taking aught, respondents may by the receivership court be required to make restitution. . . . Distribution may not be made without decision on the counterclaims. *Nothing is more clearly a part of the subject matter of the main suit than recovery of all that to the res belongs.*" (Emphasis supplied.) 296 U.S. at 241-242.

But here, in this limitation proceeding the *res* is the value of the United States Government's interest in the HAITI VICTORY. Transport Commission's alleged liability to the other claimants does not, in the language of this Court, to that *res* belong. Nor is it true that "distribution" (*i.e.*, exoneration of the United States) may not be made" without decision on the claims made against Transport Commission by other claimants. Hence it seems abundantly clear that the essential basis for the holding in equity receivership cases that the filing of a claim confers personal jurisdiction over the claimant to enforce a counterclaim is wholly absent here.

Even more revealing is the situation in bankruptcy proceedings. For in these, unlike equity proceedings but like those for limitation of liability, the jurisdiction of the court over the subject matter is limited by the provisions of a statute. So, for instance, one who holds property adversely to the bankrupt and not merely under colorable claim does not, by filing a claim, submit the determination of his rights in the property adversely held to the summary jurisdiction of the bankruptcy court. *Cline* v. *Kaplan*, 323 U.S. 97; *B. F. Avery & Sons Co.* v. *Davis*, 192 F. 2d 255 (5th Cir. 1951). Of even greater present relevance here are the many decisions, covering a whole variety of situations, in which bankruptcy courts have been held without jurisdiction to decide controversies between claimants or between claimants and third persons, even growing out of transactions involved in the bankruptcy proceedings, unless their determination was essential to dispose of the funds in the hands of the trustee. *Fulton National Bank* v. *Hozier*, 267 U.S. 276; *Central States Corp.* v. *Luther*, 215 F. 2d 38, 45 (10th Cir. 1954), *cert. denied*, 348 U.S. 951; *Brumby* v. *Jones*, 141 Fed. 318 (5th Cir. 1905); In re *Chakos*, 24 F. 2d 482 (7th Cir. 1928); *Nixon* v. *Michaels*, 38 F. 2d 420 (8th Cir. 1930); *Evarts* v. *Eloy Gin Corp.*, 204 F. 2d 712 (9th Cir. 1953), *cert. denied*, 346 U.S. 876; In re *Pyrocolor Corp.*, 46 F. 2d 554 (S.D.N.Y. 1930); *Kaplan* v. *Guttman*, 217 F. 2d 481 (9th Cir. 1954); In re *Lubliner* v. *Trinz Theatres*, 100 F. 2d 646 (7th Cir. 1938).

The *Chakos* case, *supra*, illustrates how irrelevant it is that the controversy which may not be determined arises out of the same facts as one which must be determined in the bankruptcy proceeding. Steve Chakos was adjudged bankrupt and among his creditors was one Frawley, who claimed under a lease made by him to

Steve and his brother, Gus. Frawley not only asserted a claim as a general creditor of Steve but also invoked the jurisdiction of the court to enforce Gus's liability under the lease. The court upheld Frawley's status as a general creditor but characterized the controversy with Gus as "one concerning solely alleged civil liability of third persons" not "affecting the property of the bankrupt" and held that not even consent of the parties could confer jurisdiction on the court. It will be seen that here the lease was a transaction common to both controversies.

In short, the similarity which the Court of Appeals thought existed between limitation proceedings and equity receivership proceedings turns out on examination, we submit, to be a complete dissimilarity. In this limitation proceeding, the question of the liability of Transport Commission to these claimants does not pertain to the only issue which the court in statutory limitation of liability proceedings is empowered to adjudicate—the rights of shipowner and claimants to the *res* before it. Transport Commission's liability does not "to the res belong." On the contrary, the real analogy of bankruptcy proceedings, governed as they are by a specific and jurisdictionally restricted statute, makes it plain that the claimants' rights against one another may not be litigated and adjudicated in the limitation proceeding.

III

PRIOR DECISIONS IN THE UNITED STATES, AND THE LAWS OF FOREIGN NATIONS, REFLECT THE DANGERS TO LIMITATION PROCEDURES WHICH WOULD RESULT FROM THE DECISION BELOW.

We have already noted that until the present case the course of decisions in the lower federal courts denied the right of impleader which has been granted to the

present claimants. Contrary to the belief of the court below that the matter was "a question of first impression" (R. 84), the precise point involved—that Rule 56 is inapplicable to limitation proceedings—had already been passed upon several times adversely to the conclusion reached below in this case. Indeed, the leading text on admiralty states that impleader under Rule 56 is "not permitted in a limitation proceeding". 2 Benedict on Admiralty (6th ed. 1940) Sec. 349, 1955 Supp., p. 31.

The earlier authority principally relied upon by the District Court (R. 59) was *Department of Highways* v. *Jahncke Service*, 174 F. 2d 891 (5th Cir. 1949). In that case a damage claimant in a limitation of liability proceeding sought to implead, under Rule 56, a third person alleged to be jointly liable with the limitation petitioner. A motion to strike the third party petition was granted by the District Court, and was affirmed on appeal. Although the third party sought to be impleaded was not a claimant, as Transport Commission is here, the opinion of Judge Hutchison indicates that he did not regard that fact as in any way material. The third party was within the jurisdiction of the court and was subject to service of process. If Rule 56 permits one claimant in a limitation proceeding to implead another, as held below, it must perforce permit a claimant in such a proceeding to implead any third party upon whom service can be had. The *Jahncke* decision, rather, rests upon the analysis outlined in Point I, *supra*. The court said (174 F. 2d at p. 895):

> "Further, a consideration of the origin, nature and purpose of a limitation of liability proceeding and of the origin, nature and extension of the third party practice under original Admiralty Rule 59,

> now Rule 56, leaves us in no doubt as to the correctness of appellee's contention." (Footnotes omitted.)

The same result had also been reached in several cases in which a limitation petitioner, rather than another claimant, has sought to invoke Rule 56 to implead a claimant or a third party. *New Jersey Barging Corp.* v. *T.A.D. Jones Co.*, 135 F. Supp. 97 (S.D.N.Y. 1955); *Petition of Texas Co.*, 81 F. Supp. 758 (S.D.N.Y. 1948); *Poling Bros. No. 5—Tom Wogan*, 1937 A.M.C. 1513 (E.D.N.Y.). In each of these cases the court regarded the attempted impleader as improperly expanding the necessarily special and limited purpose of the limitation of liability proceeding. In the *New Jersey Barging Corp.* case, for example, Judge Lumbard (sitting in District Court), concluded that the limitation petitioner was seeking to convert the proceeding into one by the other claimants against the claimant which the limitation petitioner sought to implead—a proceeding in which the limitation petitioner would become "little more than an interested onlooker." Judge Lumbard stated (135 F. Supp. at p. 99):

> "It would be odd, indeed, if a shipowner could, by the device of a limitation of liability proceeding, initiate on the behalf of claimants it does not represent an action against a corporation in a jurisdiction where it could not otherwise be sued."

Nor could the court find any basis in Rule 56 for permitting the limitation petitioner to seek an affirmative recovery against the claimant. In *Algoma Central & Hudson Bay Ry. Co.* v. *Great Lakes Transportation Corp.*, (86 F. 2d 708, 710) (2nd Cir. 1936), Judge

Learned Hand had stated of a limitation of liability proceeding: "At no time can the owner [limitation petitioner] recover a dollar by means of it from anybody." Relying upon that statement, the court in the *New Jersey Barging Corp.* case also concluded that a limitation proceeding "is a defensive action" (135 F. Supp. at p. 99). Moreover, as Judge Lumbard pointed out, the limitation petitioner, though in fact in a defensive position, has a considerable degree of initiative as to the forum in which he will proceed, and can thus deprive claimants of their ordinary right to choose their forum. He adds (135 F. Supp. at pp. 99-100):

> "To hold that after having summoned the claimants to a forum of his choosing he may then assert against them his own affirmative claims would go far beyond what the statute would permit."

One situation can probably be fairly distinguished. Where a limitation claimant itself invokes the jurisdiction of the court to limit his own liability, it is obviously no imposition upon him to require that he answer claims over against him. In this situaton, two District Courts have permitted Rule 56 to be utilized to achieve a desirable consolidation of the proceedings. *City of Boston*, 182 Fed. 171 (D. Mass. 1909); *The Clio-The Springhill*, 1948 A.M.C. 75 (S.D.N.Y. 1947). In each instance the owners of the vessels involved in a collision had filed separate but contemporaneous limitation proceedings in the same court. In each case the court permitted limitation petitioner A, in whose limitation proceeding B, the owner of the other vessel, had filed a claim, to implead B under Rule 56.

These two decisions represent the only instances in which impleader under Rule 56 has ever been sanctioned in a limitation proceeding, so far as we have been able

to determine. Whether they were correctly decided, or whether some other procedure should have been utilized to bring together the two related limitation proceedings which were pending before the same court, need not now concern us. No comparable situation is presented in a case such as the present one, where not only is the claimant sought to be impleaded present merely because of its response to a monition, but also is sought to be impleaded by other claimants, rather than by the limitation petitioner itself.

In the present case the Government, as the limitation petitioner, made no attempt to invoke Rule 56. Instead, following the decision below, and the remand of the cause to the District Court, it filed a so-called "cross-libel" under Rule 50, and served it upon the proctors for Transport Commission (see pp. 4-5, *supra*). Such a procedure had been expressly disapproved by no less an authority on admiralty than Judge Hough in *The Steel Inventor*, 1925 A.M.C. 226 (S.D.N.Y.), in which he stated (pp. 228-229):

> "Thus the affair resolves into this—can an affirmative decree for damages against a claimant (plus exoneration fro mlaibility on the part of petitioner) issue under a cross libel in a limitation proceeding? I think not, not only because it has never been done (though that has its potency) but because the nature of the cause of action in limitation, the necessary framework of pleadings and the wording of Rule 50 prevents it."

Very recently, the Court of Appeals for the Second Circuit, reversing the District Court for the Southern District of New York, has permitted such a "cross-libel" to be filed, citing as "persuasive" the decision of the court below in the present case. *Moore-*

McCormack Lines, Inc. v. *McMahon*, 235 F. 2d 142 (1956). There are, of course, considerations which distinguish the right of a limitation petitioner to file a "cross-libel" under Rule 50 from the right of one claimant to implead another under Rule 56. Whatever equitable rights there may be between a limitation petitioner and a claimant (*cf. United States* v. *The Thekla*, 266 U.S. 328) do not exist between persons whose only relationship is that they both have filed claims in a limitation proceeding. Nevertheless, we believe the earlier decision by Judge Hough in *The Steel Inventor* to be sound. The opinion in the *Moore-McCormack Lines* case did not analyze the history or nature of either a limitation proceeding or the third party practice in the admiralty, and accepted, uncritically, the same alleged analogies from "modern civil practice" which we have already shown (pp. 29-31) to be inapplicable when applied to the special and unique problems presented by a proceeding to limit liability in admiralty.

Indeed, whatever may be the superficial attraction of the analogy to third party practice in ordinary litigation, a moment's reflection will reveal the unwisdom of an indiscriminate graft of such procedures onto limitation of liability actions in admiralty.

The dangers are very real, and very substantial. They arise directly from the fact that ships are nomadic, whereas the courts of any single country are limited in the extraterritorial effectiveness of their monitions and decrees. If limitation proceedings are to accomplish their purpose of marshalling claims and discharging the owner, foreign claimants—claimants against whom the monition of the limitation court is precatory rather than mandatory—must be encouraged to respond. In the present case, for example, in re-

sponse to the monition of the Norfolk court, which was published not only in the United States but in newspapers in other countries (R. 29), 115 claims were filed, of which only 11 were by Americans. Among the foreign claims, 71 were by British subjects, 18 by Germans, 8 by Dutchmen, and one each from Australia, Ireland, Italy and Norway. Foreign claimants do appear in United States limitation proceedings, in other words, even though there can be no compulsion exerted on them to do so.

Were foreign claimants to conclude, for any reason, that they should not file their claims in the United States limitation proceeding, the consequences would be serious. A decision by the United States court on the issue of fault would not be res judicata against foreign claimants who do not file claims, and of course the final injunction of the limitation court against suits would not be effective to prevent suits by such foreign claimants in their own countries. Any claimant domiciled in, or even near, a country in which there was any reasonable prospect of levying attachment on the ship, or on any other ship or property owned by the same person or corporation,[15] or of securing personal service on the owner itself, could sit tight and bring an independent suit.[16]

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[15] "The process of foreign attachment is known of old in admiralty. It has two purposes: To secure a respondent's appearance and to assure satisfaction in case the suit is successful." *Swift & Co. v. Compania Caribe*, 339 U.S. 684, 693. See Admiralty Rule 2.

[16] In England, for example the court is authorized to extend the period of the statute of limitations indefinitely when "there has not during such period been any reasonable opportunity of arresting the defendant vessel within the jurisdiction of the court." Maritime Conventions Act, 1911 (1 & 2 Geo. 5, c. 57) Sec. 8.

The consequences, of course, would be either a *pro tanto*, or a complete, failure of the limitation proceeding. Necessarily, the petitioning owners and their fleet would continue in jeopardy in respect to foreign claimants who elected to bring suit abroad. Furthermore, if enough claimants were to abstain so that the aggregate of presented claims was reduced to an amount less than the fund deposited by the petitioner, the limitation procedures would be completely unavailable.[17]

No one, of course, can document statistically the extent to which limitation procedures in the United States would become ineffective or illusory if the position of the court below were to be adopted here. Some claimants might regard the likelihood of claims against them as so negligible as to be irrelevant. To most, however, the possibility of being subjected to unknown liability in a foreign court applying foreign law would represent a hazard to be weighed seriously

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[17] Limitation proceedings are not primarily intended to prevent a multiplicity of suits, but rather to marshall claims and distribute an inadequate fund. *Petition of Texas Co.*, 213 F. 2d 479 (2d Cir. 1954); *Petition of Moran Transp. Co.*, 185 F. 2d 386, 388-389 (2d Cir. 1950). Prior to the 1935 amendments which limited the time within which limitation proceedings could be initiated, the proceeding would be dismissed when the claims did not exceed the fund. *The Aquitania*, 14 F. 2d 456 (S.D. N.Y. 1926); *The Tug No. 10*, 237 F. 105 (S.D. N.Y. 1916). Since 1935 jurisdiction is retained, but all exercise of it suspended and the petition for limitation is not finally dismissed until it has been determined (by independent litigation, etc.) that the claims are insufficient to exhaust the fund. *Curtis Bay Towing Co. v. Tug Kevin Moran*, 159 F. 2d 273 (2d Cir. 1947).

In the present case, had no foreign claimants appeared, the total amount claimed by the persons within the jurisdiction of the District Court would have been less than half of the value of the Haiti Victory.

against the possibility of suing in their own country. One can surely say, at least, that the consequences in terms of effective limitation proceedings in the United States would be substantial.

Although the rationale has not been expressed in these terms, it is significant that in no foreign country is a claimant in a limitation proceeding exposed to the risk which has been imposed by the decision below upon claimants in limitation proceedings in the United States. In England, for example, the right to limitation is now embodied in the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60) and other statutes. The petition for limitation of liability is made to the Admiralty Registrar in accordance with Rule LV (H) of the Rules of the Supreme Court [see The Annual Practice 1956 (London, 1956), pp. 1211c, 1212], which makes no provision for either counterclaims or impleaders among co-claimants.

In Canada, limitation of liability is provided for in Sections 657-659 of the Revised Statutes (Canada Shipping Act, 1934, c. 44), and is administered by the Exchequer Court, and District Judges in Admiralty by assignment from that court. The "General Rules and Orders Regulating the Practice and Procedure in Admiralty Cases in the Exchequer Court of Canada" (The Canada Gazette, July 29, 1939 (Suppl.)) contain no specific rules with respect to limitation proceedings. Rule 33, a rule similar to Rule 56 of this Court, permits "a defendant" to move for the joinder of a third person from whom he asserts "that he is entitled to contribution or indemnity". There is no suggestion that one claimant may invoke this third party procedure against another claimant, as is sought to be done here.

Likewise, in the continental countries, impleader or comparable procedural moves similar to that sanctioned

by the court below, are unheard of. Three basic systems of limitation of liability exist in those countries: (1) the French system of "abandon", which is also applied in Italy, Spain and some 16 other European, Middle Eastern and Latin American countries;[18] (2) that German "execution" system under which the vessel itself, and not the owner, is responsible for damage done by it, and the liability of the owner is limited from the outset to his interest in the vessel;[19] and (3) the "option" system of the Brussels Convention of 1924,[20] which in practice means the English system, since in most cases it is more advantageous for the owner to limit his liability on the basis of £8 per ton (or £16 per ton if death or personal injuries are involved) than

[18] Code de Comm., Art. 216; see Ripert, Droit maritime (1952) ed.), Secs. 1254bis, 1283-1284, 2008. As to Italy: Cod. di Navig. (1941) Arts. 275-277, 620-641; see d'Ovidio-Pescatore, Manuale di diritto della navigazione (1950) pp. 442 *et seq.* As to Spain: Código de comm., Art. 587; see de Montellá, Código de commercio español comentado, Vol. IV 1° (1936) pp. 120, *et seq.* In Belgium the system of "abandon" still prevails, although in some cases it is combined with the English system of limitation per ton: Code de Comm., L. II, Arts. 46 *et seq.*; see Répert. prat. du droit belge (1951), Vol. VIII, V° "Navire-Navigation", Nos. 318-321.

[19] German Comm. Code (HGB) Arts. 486, 761; see Wüstendörfer, Neuzeitliches Seehandelsrecht (1950 ed.), pp. 125, 129-130, 137-138; Gierke, Handelsrecht und Schiffahrtsrecht (1955 ed.), Sec. 81; Ripert, *supra*, Sec. 1283.

[20] Brussels Convention of August 25, 1924 (League of Nations Treaty Series, No. 2763). The convention has also been ratified by a number of other countries, and has produced some uniformity with respect to the *amount* of liability to which the owner is to be held subject in a limitation proceeding. It has not been ratified by the United States, the United Kingdom, or Germany. Currently efforts are being made to rewrite the Convention to increase the scale of liability so as to encourage its broader adoption. See Le droit maritime francais, Vol. VIII, p. 1 (Jan. 1956).

to abandon the vessel and freight.[21] Sweden, which has a relatively new (1948) procedural code, and which comes perhaps closest to our own system, may serve as an example. Limitation proceedings there are initiated by the owner and conducted before an "average adjuster" (Com. Code, Art. 261), whose duties are limited to the determination of the amount to which the owner's liability is to be limited, and the distribution of that amount among the claimants. The decision of the average adjuster may be appealed to the regular Swedish courts, but the results of the proceedings are res judicata on those issues, when finally determined. Similar procedure applies in Italy and Belgium, with the exception that the limitation proceedings take place before a judge-commissioner.

In all civil law countries the limitation proceedings are based on the admission by the owner of *in rem* liability, or follow separate proceedings in which that liability is determined. If fault is disputed (*i.e.*, if the shipowner claims that he is not liable even *in rem*, or if the claimants contend that he is liable also *in personam*) that issue is separately tried in court proceedings rather than litigated, as in the United States, as a part of the limitation proceeding itself. At no stage of any of the proceedings, however, is there any method or practice by which they could be expanded to adjudicate liability among the claimants themselves. The proceedings always take place between the claimants on the one side, and the owner or the limitation fund on the other.

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[21] Countries in this group are Holland (since 1927; see Wetboek van Koophandel, Arts. 474, 525, 541; Völlmar, Zee en Binnenvaartrecht (1952 ed.), Sec. 136, 137, 247, 248, 279); and the Scandinavian countries (since 1939; see, e.g., Swedish Maritime Code, Ch. 10. Until then the Scandinavian countries generally followed the German pattern).

Even where, as in France or in Holland, the case law (Trib. civ. Poitiers, 21 February 1901; Ripert, *supra*, Sec. 1322) or the basic rules of civil procedure applied to maritime law (Wetboek van Burgerlijke Regtsvordering, Art. 320a, and *passim*) allow a "compensation" or counter-claim by the limitation petitioner against a claimant, it is in the nature of a set-off only, not an affirmative judgment. A joinder of actions, possible in the discretion of the court in Holland in fact situations similar to those contemplated by Admiralty Rule 56, applies only to libel, and not to limitation proceedings.

Nowhere in the codes of other countries, nor in the commentators on them, have we found any suggestion that the result reached by the court below is even possible. Impleader in limitation of liability proceedings of a claimant otherwise not within the jurisdiction of the court is a procedure unknown in other maritime countries and unsanctioned in the United States until the decision of the court below. To permit it now in the United States will, to an incalculable but substantial extent, destroy the very object of the proceeding by frightening away claimants, who, as this litigation itself indicates, are normally willing to submit to the limited jurisdiction of the limitation court. This is more than just robbing Peter to pay Paul. It is mortgaging for the future the shipowner's recognized need for effective international limitation of his liability in order to cater to the convenience of a few claimants in one particular litigation. It is this, and not principles of "modern civil procedure", or seeming analogies to equity receiverships, which is the basic problem of policy presented by this proceeding. The answer, we submit, should preserve limitation procedures for what they are designed to do—limit, effectively, a ship-

owner's liability. The decision below, which seeks to make of them a forum for other controversies also, may well result in destroying their effectiveness for any purpose.

CONCLUSION

WHEREFORE, the judgment of the Court of Appeals reversing the decree of the District Court denying the impleading of the Commission by the other claimants in the limitation proceeding should be reversed, and the decree of the District Court should be affirmed.

Respectfully submitted,

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MARCH, 1957.

The United States Code, Title 46, provides:

§ 183 (a) The liability of the owner of any vessel, whether American or foreign, for any embezzlement, loss, or destruction by any person of any property, goods, or merchandise shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not, except in the cases provided for in subsection (b) of this section, exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.

* * * * *

§ 185. The vessel owner, within six months after a claimant shall have given to or filed with such owner written notice of claim, may petition a district court of the United States of competent jurisdiction for limitation of liability within the provisions of this chapter and the owner (a) shall deposit with the court, for the benefit of claimants, a sum equal to the amount or value of the interest of such owner in the vessel and freight, or approved security therefor, and in addition such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of section 183 of this title, or (b) at his option shall transfer, for the benefit of claimants, to a trustee to be appointed by the court his interest in the vessel and freight, together with such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out

the provisions of section 183 of this title. Upon compliance with the requirements of this section all claims and proceedings against the owner with respect to the matter in question shall cease.

Admiralty Rule 51 provides:

The owner or owners of any vessel who shall desire to claim the benefit of limitation of liability provided for in the third and fourth sections of the Act of March 3, 1851, entitled "An Act to limit the liability of shipowners and for other purposes" (Sections 183 to 189 of Title 46 of the U. S. Code) as now or hereafter amended or supplemented, may file a petition in the proper District Court of the United States, as hereinafter specified. Such petition shall set forth the facts and circumstances on which limitation of liability is claimed, and pray proper relief in that behalf. It shall also state facts showing that the petition is filed in the proper district; the voyage on which the demands sought to be limited arose, with the date and place of its termination; the amount of all demands including all unsatisfied liens or claims of lien, in contract or in tort, arising on that voyage, so far as known to the petitioner, and what suits, if any, are pending thereon; whether the vessel was damaged, lost or abandoned, and, if so, when and where; the value of the vessel at the close of the voyage or, in case of wreck, the value of her wreckage, strippings or proceeds, if any, and where and in whose possession they are; and the amount of any pending freight recovered or recoverable. If any of the above particulars are not fully known to the petitioner, a statement of such particulars according to the best knowledge, information, and belief of the petitioner shall be sufficient. With his petition the petitioner

may, if he so elects, file an interim stipulation, with sufficient sureties or an approved corporate surety, for the payment into court whenever the court shall so order, of the aggregate amount of the value of petitioner's interest in the vessel at the close of the voyage, or, in case of wreck, the value of the wreckage, strippings or proceeds, and of any pending freight recovered or recoverable, with interest at six percent per annum from the date of the stipulation, and costs. If such interim stipulation is filed, it shall be accompanied by an affidavit or affidavits of a competent person or persons corroborating the statement in the petition as to value of the vessel, or her wreckage, etc., and her freight. Said court, having caused due appraisement to be had of the value of petitioner's interest in the vessel, or her wreckage, etc., and her freight shall make an order for the payment of the same into court, or for the giving of a stipulation, with sufficient sureties or an approved corporate surety, for the payment thereof into court with interest at six percent per annum from the date of the stipulation, whether interim or final, and costs, whenever the same shall be ordered; or, if the petitioner shall so elect, the court without such appraisement shall make an order for the transfer by the petitioner of his interest in such vessel, or her wreckage, etc., and freight to a trustee to be appointed by the court under the fourth section of said Act.

If a surrender of petitioner's interest in the vessel or her wreckage, etc., is offered to be made to a trustee, the petition must further show any prior paramount liens thereon, and what voyage or trips, if any, she has made since the voyage or trip on which the claims sought to be limited arose, and

any existing liens arising upon any such subsequent voyage or trip, with the amounts and causes thereof, and the names and addresses of the lienors, so far as known; and whether the vessel sustained any injury upon or by reason of such subsequent voyage or trip.

Upon the filing of such interim stipulation, or upon determination of value by appraisal and compliance with the court's order with respect thereto, or upon compliance with a surrender order, as the case may be, the court shall issue a monition against all persons asserting claims in respect to which the petition seeks limitation, citing them to file their respective claims with the Clerk of said court and to serve on or mail to the proctors for the petitioner a copy thereof on or before a date to be named in said writ which shall be not less than 30 days after issuance of the same, which time the court, for cause shown, may enlarge.

Notice of the monition shall be published in such newspaper or newspapers as the court by rule or order may direct in substantially the following form, once in each week for four successive weeks before the return day of the monition:

UNITED STATES DISTRICT COURT
DISTRICT OF

NOTICE OF PETITION FOR EXONERATION FROM OR LIMITATION OF LIABILITY

(Filed . . . . .)

Notice is given that . . . has filed a petition pursuant to Title 46, U.S. Code, §§ 183-189, claiming the right to exoneration from or limitation of lia-

bility for all claims arising on the voyage of the vessel . . . from . . . to . . . terminating on . . . .

All persons having such claims must file them, under oath, as provided in United States Supreme Court Admiralty Rule 52, with the Clerk of this Court, at the U.S. Court House at . . . and serve on or mail to the petitioner's proctors . . . at . . . a copy on or before . . . or be defaulted. Personal attendance is not required.

Any claimant desiring to contest the claims of petitioner must file an answer to said petition, as required by Supreme Court Admiralty Rule 53, and serve on or mail to petitioner's proctors a copy.

. . . . . ,

U. S. Marshal.

The petitioner not later than the day of second publication shall also mail a copy of the above notice (copy of the monition need not be mailed) to every person known to have made any claim against the vessel or the petitioner arising out of the voyage or trip on which the claims sought to be limited arose. In cases involving death a copy of such notice, together with a copy of Rule 52, shall be mailed to the decedent at his last-known address, and also to any person who shall be known to have made any claim on account of such death.

The said court shall also, on the application of the petitioner, make an order to restrain the further prosecution of all and any suit or suits against the petitioner and/or said vessel in respect to any claim or claims subject to limitation in the proceeding.

Admiralty Rule 53 provides:

In the proceedings aforesaid, the petitioner shall be at liberty to contest his liability, or the liability of said vessel, provided he shall have complied with the requirements of Rule 51 and shall also have given a bond for costs and provided that in his petition he shall state the facts and circumstances by reason of which exoneration from liability is claimed; and any person claiming damages as aforesaid who shall have filed his claim under oath and intends to contest the right to exoneration or limitation, shall file an answer to such petition, and serve a copy on proctor for petitioner, and may contest the right of the owner or owners of said vessel, either to an exoneration from liability or to a limitation of liability under the said Act of Congress, or both, provided such answer shall in suitable allegations state the facts and circumstances by reason of which liability is claimed or right to limitation should be denied.

Admiralty Rule 56 provides:

In any suit, whether *in rem* or *in personam*, the claimant or respondent (as the case may be) shall be entitled to bring in any other vessel or person (individual or corporation) who may be partly or wholly liable either to the libellant or to such claimant or respondent by way of remedy over, contribution or otherwise, growing out of the same matter. This shall be done by petition, on oath, presented before or at the time of answering the libel, or at any later time during the progress of the cause that the court may allow. Such petition shall contain suitable allegations showing such liability, and the

particulars thereof, and that such other vessel or person ought to be proceeded against in the same suit for such damage, and shall pray that process be issued against such vessel or person to that end. Thereupon such process shall issue, and if duly served, such suit shall proceed as if such vessel or person had been originally proceeded against; the other parties in the suit shall answer the petition; the claimant of such vessel or such new party shall answer the libel; and such further proceedings shall be had and decree rendered by the court in the suit as to law and justice shall appertain. But every such petitioner shall, upon filing his petition, give a stipulation, with sufficient sureties, or an approved corporate surety, to pay the libellant and to any claimant or any new party brought in by virtue of such process, all such costs, damages, and expenses as shall be awarded against the petitioner by the court on the final decree, whether rendered in the original or appellate court; and any such claimant or new party shall give the same bonds or stipulations which are required in the like cases from parties brought in under process issued on the prayer of a libellant.